UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SOCIAL SECURITY ADMINISTRATION, Petitioner,	)	DOCKET NUMBERS CB-7521-94-0033-T-1 BN-1221-94-0198-W-1 BN-1221-95-0031-W-1
v.	)	
ROKKI KNEE CARR, Respondent.	)	DATE: APR 24, 1998

William K. Bean, Esquire, Falls Church, Virginia, for the Petitioner.

Kathleen Eldergill, Esquire, Beck & Eldergill, P.C., Manchester, Connecticut, for the Respondent.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

Vice Chair Slavet issues a concurring opinion.

FINAL DECISION AND ORDER

This case is before the Board on a recommended decision and initial decision issued on June 13, 1997, by the Board's Chief Administrative Law Judge

(CALJ), Paul G. Streb.[1] The CALJ recommends that we find that good cause exists to remove the respondent from her administrative law judge (ALJ) position. For the reasons set forth below, we ADOPT the recommended decision and authorize the petitioner to remove the respondent. 5 C.F.R. § 1201.136. Also, after full consideration, we DENY the respondent's petition for review of the initial decision denying her request for corrective action in MSPB Docket No. BN-1221-94-0198-W-1 because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. We DISMISS her petition for review of the initial decision denying her request for corrective action in MSPB Docket No. BN-1221-95-0031-W-1 because it is now moot.

BACKGROUND

On June 20, 1994, the petitioner filed a complaint with the Board under 5 U.S.C. § 7521 seeking authority to remove the respondent from her position as an ALJ based on 6 charges supported by 28 specifications. MSPB Docket No. CB-7521-94-0033-T-1 (Complaint File), Tab 1. The respondent filed a timely June 27, 1994 IRA appeal, MSPB Docket No. BN-1221-94-0198-W-1, Tab 1, and a second timely IRA appeal, MSPB Docket No. BN-1221-95-0031-W-1 (IRA 2 File), Tab 1, on October 10, 1994. The respondent filed a timely answer to the petitioner's complaint, and the CALJ consolidated the complaint with the appellant's two IRA appeals. Complaint File, Tabs 4, 5, 13. After

---

[1] Effective September 16, 1997, the Board amended its regulations so that, in cases involving proposed actions against administrative law judges under 5 U.S.C. § 7521, the CALJ will no longer issue a recommended decision to which a party may file exceptions, but will issue an initial decision subject to the provisions of 5 C.F.R. §§ 1201.111, .112, and .113 governing petitions for review of initial decisions. 62 Fed. Reg. 48,455 (1997) (to be codified at 5 C.F.R. § 1201.140(a)(2)). Because this recommended decision was issued before the amended regulations became effective, we will adjudicate it under the previous regulations in effect on June 13, 1997, when the recommended decision was issued.

affording the respondent her requested hearing, the CALJ issued a recommended decision that the Board find good cause to remove the respondent and authorize the petitioner to do so. The CALJ also issued an initial decision denying the respondent's requests for corrective action in her IRA appeals. Complaint File, Tab 45.

The respondent has timely filed exceptions to the recommended decision and a petition for review of the initial decision regarding her IRA appeals, arguing that the CALJ erred: (1) In finding that the agency's actions had not violated her due process rights to notice of the charges against her and an opportunity to be heard; (2) in considering certain specifications which should have been barred because the agency had previously imposed discipline on her based on the misconduct in those specifications; (3) in sustaining the remaining specifications because of lack of evidence or improper credibility findings; (4) in finding that the respondent did not establish her affirmative defense of reprisal for whistleblowing; (5) and in denying her request for corrective action in her second IRA appeal. The respondent requests an opportunity to present oral argument. Exceptions File, Tab 5. The Federal Administrative Law Judges Conference and the Association of Administrative Law Judges, Inc., have filed an amicus brief. *Id*., Tab 6. Also, Robert A. Pulcini, an ALJ employed by the petitioner and a witness at the hearing, has filed a motion to intervene. *Id*., Tab 9. The petitioner has replied in opposition to the motion to intervene, and Pulcini has replied to the petitioner's opposition. *Id*., Tabs 10, 11. The petitioner has replied to Pulcini's filing, *id*., Tab 12, and has also timely responded in opposition to the respondent's exceptions and the amicus brief, *id*., Tab 13. After the close of the record on October 14, 1997, the respondent replied in opposition to the motion to intervene. *Id*., Tabs 4, 14. Thus, we have not considered the respondent's reply in opposition to the motion to intervene. *See id.*, Tab 4; 5 C.F.R. § 1201.114(i).

ANALYSIS

Procedural matters

The respondent's request to present oral argument

We deny the respondent's request to present oral argument. While the Board's regulations at 5 C.F.R. § 1201.117(a)(2) permit oral argument in a petition for review, the respondent has not stated any reason to grant her request. Her request does not indicate what evidence and argument she would present at oral argument or how such oral argument would add to the proceeding. *See, e.g.*, *Special Counsel v. Environmental Protection Agency*, 70 M.S.P.R. 41, 49 (1996) (the Board denied the intervenor's request for oral argument because it would not assist the Board significantly in deciding the case).

The motion to intervene

On September 9, 1997, Pulcini, who was the petitioner's New Haven Hearing Office Chief ALJ during a portion of the respondent's service in that office, submitted a motion to intervene in this matter. Pulcini alleged that the CALJ in his recommended decision made findings that "accuse [him] of engaging in purported reprisals against the above-named Respondent," that these "allegations are and have been materially damaging to [him,] potentially affecting his career now and far into the future," and that "[t]he findings amount to a trial upon the merits of [his] conduct in his absence." Exceptions File, Tab 9.

The Board's regulations permit intervention by persons not a party to the case in appropriate circumstances. The Board has found that, among those circumstances, is a consideration of the timeliness of the motion to intervene. *See Stevens v. Department of Housing & Urban Development*, 36 M.S.P.R. 170, 172-73 (1988). This September 9, 1997 motion comes late in the proceeding. The petitioner requested Pulcini as a witness in its May 16, 1995 prehearing submission. Complaint File, Tab 20 at 25. Pulcini testified at the hearing with,

we presume, advance notice of the hearing and some indication of the matters about which his testimony was sought. Pulcini was certainly aware of the interactions between the respondent and himself. Moreover, at the hearing, Pulcini was questioned about the respondent's disclosures regarding time and attendance regulations, his reaction to those disclosures, confrontations between Pulcini and the respondent, and Pulcini's requests to higher management that something be done about the respondent's behavior. Transcript (TR) at 758, 763-64, 780-81, 784-86, 795-96, 825-26. Pulcini testified that he knew of the respondent's complaint to the Special Counsel a year before the hearing and that he knew that some of the allegations in the complaint were about him and the New Haven Hearing Office. TR at 798-801. We find that Pulcini was aware of the general nature of the issues in this case, as they relate to him and allegations of reprisal for whistleblowing, from at least the date of the June 1995 hearing, and therefore, under the circumstances, we find that Pulcini's motion to intervene is untimely. *See Stevens*, 36 M.S.P.R. at 172-73.

Furthermore, the Board's regulations provide that a motion for permission to intervene will be granted if the requester shows that he or she will be affected directly by the outcome of the proceeding. A person alleged to have committed a prohibited personnel practice under 5 U.S.C. § 2302(b) may ask for permission to intervene. 5 C.F.R. § 1201.114(g)(3). The CALJ found that the agency proved by clear and convincing evidence that it would have taken the actions against the respondent in the absence of whistleblowing. As set forth in detail below, we affirm that finding and thus determine that this procedure has no direct effect on Pulcini that would serve as a basis for granting his motion to intervene. *See Stevens*, 36 M.S.P.R. at 173. Nor do we discern any other reason to grant his motion, considering that we find that no prohibited personnel practice occurred. Thus, we deny Pulcini's motion to intervene in this matter.

Merits

As stated above, the petitioner requested authority to remove the respondent on the basis of 6 charges, supported by 28 specifications. We address each charge and specification in turn.

Charge 1, Specification 1, Reckless Disregard for Physical Safety

The petitioner asserts that on May 9, 1994, the respondent caused physical injury to Hearing Office Manager Louise Harris-Gonzalez in reckless disregard for her health and safety when the respondent violently threw her office door shut, thereby striking Harris-Gonzalez's right shoulder and arm with such force that it knocked her off balance and caused her to stumble backwards. According to the petitioner, Harris-Gonzalez sought and received medical treatment for her arm, shoulder, and neck and was absent from duty for two days because of the injury.[2] Complaint File, Tab 1 at 2-3. The incident was reported to the police and the police report includes a notation of a bruise on Harris-Gonzalez's arm. Petitioner's Exhibit File, Tab P-3. The record contains a medical certificate stating that Harris-Gonzalez was seen by a doctor on May 9, 1994, that arm pain was the diagnosis, and that Harris-Gonzalez was unable to work on May 10, 1994. The doctor imposed no restrictions. *Id*., Tab P-5.

The CALJ considered the testimony of the respondent and Harris-Gonzalez. Both agreed that Harris-Gonzalez was standing in the doorway when the respondent closed the door. They disagreed as to the force with which she did so. Harris-Gonzalez described it as slamming the door on her. TR at 256. The

---

[2] The specification also describes loud and insulting remarks that the respondent allegedly made, but we find that they were not a part of the charge of reckless disregard for physical safety and that the action of closing the door while Harris-Gonzalez was standing in the doorway was the essence of the charge. Complaint File, Tab 1 at 2-3.

respondent stated that she closed the door and at some point felt some resistance. TR at 1326. The CALJ did not fully credit either the respondent's or Harris-Gonzalez's version of the incident. The CALJ found that the respondent hit Harris-Gonzalez with the door but not with the violent force charged in the specification. He further found that the incident was not so serious as alleged, but that the respondent had acted with some disregard for the safety of Harris-Gonzalez, because the respondent knew that Harris-Gonzalez was standing in the doorway, but closed the door on her with some force anyway. Recommended Decision (RD) at 104-06. We agree with the CALJ's determination of the facts supporting the specification, based on his analysis of both the respondent's and Harris-Gonzalez's testimony.

The respondent argues in her exceptions that her action was in no way reckless, but was more like an inadvertent bump, and therefore the charge cannot be sustained. Exceptions File, Tab 5 at 155-56. However, the evidence shows that her action was not inadvertent because she knew that Harris-Gonzalez was in the doorway. "Reckless" has been defined as

> careless, inattentive, or negligent. For conduct to be "reckless" it must be such as to evince disregard of, or indifference to, consequences, under circumstances involving danger to life or safety to others, although no harm was intended.

Black's Law Dictionary 1270 (6th ed. 1990). We agree with the CALJ that the respondent acted in reckless disregard for Harris-Gonzalez's safety when she closed the door on Harris-Gonzalez in the doorway. Furthermore, the evidence shows that Harris-Gonzalez suffered an injury serious enough to motivate her to seek medical attention and resulting in her absence from work. Charge 1 was properly sustained.

Charge 2, Racial Epithets and Ethnic Slurs

In his recommended decision, the CALJ did not sustain charge 2, which was supported by specifications 2 through 7, in its entirety. RD at 138, 89-97, 28-30,

60-62, 55-56, 41-46, 19-28. The petitioner did not submit exceptions or challenge these findings in any way. Thus, we will not consider charge 2 and its specifications any further in this decision.

Charge 3, Persistent Use of Vulgar, Profane Language

Specification 8 asserts that the respondent told Regional Chief ALJ David Allard to "go fuck [himself]" three times during a telephone conversation in April 1994. Complaint File, Tab 1 at 4. The CALJ sustained the specification, finding Allard's testimony more credible than the respondent's denial. The CALJ noted that the respondent had admitted to using similar language in regard to other specifications, thus making her denial less credible. RD at 53-54. In her exceptions to the recommended decision, the respondent challenges that finding, arguing, as she did below, that Allard misunderstood her and that she actually said, "Thank you." Exceptions File, Tab 5 at 151. The respondent asserts that her admission that she had previously used the word "fuck" in the incident charged in specification 11 did not make it more likely than not that she used it in her conversation with Allard because the circumstances were different. The respondent explained that the incident in specification 11 occurred before she was informed that her language was unacceptable and was an informal comment directed to no one in particular. *Id*. at 152. We find that the CALJ's credibility determination is entitled to deference. As the CALJ noted, Allard testified that he heard the inappropriate word three times in the conversation and that two of those instances occurred after he called it to the respondent's attention and she denied using the word. TR at 648. We agree with the CALJ that, under the circumstances, Allard's testimony is more credible than the respondent's, and the likelihood that he misheard her remark is slight. The CALJ properly sustained the specification.

According to specification 9 of charge 3, the respondent said to Legal Clerk Antoinette Curto, in response to a law firm employee's request for a continuance,

"You tell Richard to go fuck himself, he doesn't tell me what to do!" Complaint File, Tab 1 at 4. The CALJ sustained the specification based on Curto's testimony, which he found more credible than the respondent's. RD at 85-88. In her exceptions to the recommended decision, the respondent attacks the credibility finding by pointing out that the CALJ found Curto not to be a credible witness in regard to specifications 2 and 18. Exceptions File, Tab 5 at 152-54. The Board has held that a witness who is not credible in regard to one matter may be credible about another. *See Seas v. U.S. Postal Service*, 73 M.S.P.R. 422, 430 (1997). The factors under *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987), that the CALJ considered in making his credibility finding, i.e., Curto's opportunity and capacity to observe the event or act in question; bias or lack of bias; the consistency of Curto's testimony with other evidence; and Curto's demeanor, that made Curto a credible witness in regard to specification 9 are different from those which indicated that, more likely than not, the respondent was more credible about specifications 2 and 18. We thus accept the CALJ's determination to sustain specification 9.

Specifications 10, 11, and 12 are similar. In specification 10, the petitioner alleged that on January 8, 1992, the respondent said, "I don't want to talk about this fucking shit." Complaint File, Tab 1 at 4. The CALJ sustained the specification based on the testimony of both the respondent and Harris-Gonzalez and Harris-Gonzalez's written statement. RD at 50. Our review of the transcript shows that the respondent testified that she said, "That's a lot of shit." TR at 1182.

According to specification 11, the respondent stated on January 9, 1992, during a conversation about a farewell lunch for a co-worker, "Fuck the lunch." Complaint File, Tab 1 at 5. The CALJ sustained the specification based on the testimony and written statement of Attorney-Advisor Heidi Lazar-Meyn and the respondent's testimony admitting making the remark. RD at 53; TR at 1354.

Specification 12 charges that on November 19, 1991, the respondent said to Attorney-Advisor Steven Harrell that he could "shove [the file] up [the supervisory staff attorney's] nose," referred to a "shit opinion," and called him "more of a pussy" than she thought he was, if he failed to follow her instructions. Complaint File, Tab 1 at 5. The CALJ sustained the specification based on the respondent's statement in her post-hearing brief, Harrell's testimony, and a memorandum that he prepared two days after the conversation. RD at 41. The respondent admitted to using the words, "shit," "fuck," and "pussy," as alleged in specifications 10, 11, and 12 of charge 3, language that is commonly considered to be vulgar and profane. TR at 1182, 1354, 1097-98. Her arguments in her exceptions to the recommended decision, addressing the reasons for her behavior, are properly considered in the penalty analysis to determine whether removal is appropriate. We agree with the CALJ's determination to sustain specifications 10, 11, and 12.

In specification 13, the respondent allegedly used the word "cunt" and the phrase "You can stick it ... goodbye" in an October 11, 1991 conversation with Albuquerque Hearing Office Chief ALJ Jon Boltz. Complaint File, Tab 1 at 5. The respondent admitted to the "stick it" remark. TR at 1096-97. The CALJ found Boltz's testimony that the respondent used the word "cunt" more credible than her denial, and we see no reason to disturb that explained finding. RD at 32-34. In her exceptions, the respondent argues that Boltz is a biased witness because the respondent mentioned his alleged improper behavior in her equal employment opportunity (EEO) complaint. Exceptions File, Tab 5 at 165. However, the CALJ addressed this argument below, finding that no evidence showed that Boltz was aware of the respondent's allegations at the time that he wrote an October 15, 1991 memorandum informing his supervisor of the respondent's remarks or at the time of the hearing. RD at 34. We see no reason to disturb the CALJ's determination to sustain specification 13.

In specification 14, the petitioner charged that in late 1991 the respondent said to Harris-Gonzalez, "I want you to call them [sic] fucks and tell them to send my mail to me everyday .... I would call, but that fucking Judge Boltz will not talk to me ...." Complaint File, Tab 1 at 5. On another occasion for which the date is not specified, the respondent allegedly said to Harris-Gonzalez, "Send this file back to them and tell those fucks to add the exhibits." *Id*. The CALJ sustained the specification based on the testimony of Harris-Gonzalez and a January 10, 1992 memorandum prepared by Harris-Gonzalez. The CALJ found that the respondent's denial of the misconduct was not credible. RD at 47. She testified that she "didn't use that kind of language," but she admitted to using the same vulgar and profane words on other occasions. TR at 1354. In her exceptions, the respondent again denies using that language with Harris-Gonzalez and generally attacks her credibility. Exceptions File, Tab 5 at 166-67. However, we see no reason to disturb the CALJ's credibility finding. Thus, we agree with the determination to sustain the specification. The CALJ properly sustained charge 3.

Charge 4, Demeaning Comments, Sexual Harassment, and Ridicule

The CALJ did not sustain specification 15 of charge 4. RD at 72-76. The petitioner did not submit exceptions or challenge these findings in any way. Thus, we will not consider specification 15 any further in this decision.

The CALJ sustained specification 16 in part. According to the sustained portion of specification 16, the respondent stated to Curto, "God is going to get you," and to Secretary El-Nora Carroll, "You are the ugliest, fattest, stupidest person I know" and added, while passing Hearing Assistant Nan Nolan, "besides Nan." Complaint File, Tab 1 at 6. The CALJ found that the respondent admitted to making the remark to Curto and he further found that the remark was inappropriate and amounted to harassment. RD at 76-77. The respondent did not challenge these findings in her exceptions and we agree with the CALJ's determination to sustain the portion of specification 16 regarding the remark to

Curto. Likewise, the CALJ sustained the portion regarding remarks to Carroll and Nolan based on Carroll's testimony and written statement and the fact that the respondent admitted to making the remarks. The CALJ noted the respondent's arguments regarding the context of the remarks and the atmosphere in the office but found that those arguments were better addressed in his penalty analysis. RD at 77-78. In her exceptions, the respondent again argues that the context of the remarks explained away the incident. Exceptions File, Tab 5 at 72-73. We agree with the CALJ's sustaining this portion of specification 16.

The CALJ did not sustain specifications 17 and 18 of charge 4. RD at 39-40, 62-65. The petitioner did not submit exceptions or challenge these findings in any way. Thus, we have not considered them further.

In specification 19 of charge 4, the petitioner asserted that the respondent engaged in embarrassing and offensive use of sexual innuendo with co-workers and the public and cited a November 13, 1991 incident. When the respondent introduced Attorney-Advisor Lazar-Meyn to Brad Plebani, a claimant's attorney, Plebani said that he already knew Lazar-Meyn and the respondent inquired, "In the biblical sense?" Complaint File, Tab 1 at 6. Some time later, the respondent allegedly said to Lazar-Meyn, "The next time that you have a suggestion, you can take it and stick it [very long pause] on the wall." *Id.* The respondent admitted making the "in the biblical sense" remark. TR at 1368-70. Regarding the "stick it" remark, the respondent testified that she may have said it. TR at 1370-71.

The respondent, in her exceptions, does not challenge the finding that she made the alleged remarks, but argues that her remarks do not constitute demeaning comments, sexual harassment, or ridicule. Exceptions File, Tab 5 at 167-68. The CALJ found that the "biblical sense" remark was embarrassing and offensive, even if intended as a joke, particularly since members of the public were present. RD at 37-38. He further found that the "stick it" remark was embarrassing criticism of Lazar-Meyn. RD at 38-39. We agree with the CALJ.

Contrary to the respondent's assertion, Lazar-Meyn did not testify that she took the remarks as a joke but that the respondent apparently meant them as a joke. TR at 112. Lazar-Meyn testified that she blushed at the "biblical sense" remark, indicating that she was embarrassed by it. TR at 100. Moreover, we agree with the CALJ's finding that the "stick it" remark was not intended as a joke but as offensive criticism of Lazar-Meyn.

Specification 20 of charge 4 describes an incident alleged to have occurred on January 25, 1991, when the respondent, during a visit to the White Plains Hearing Office, said to ALJ Herbert Rosenstein, "Let's go into your office and get laid." Complaint File, Tab 1 at 4, 6. The respondent testified that she remembered the incident but denied making that statement. She testified that she said, "Where do you go when you want to get laid?" TR at 1089-90. Whichever version of the remark is correct, it is still offensive. The CALJ found that the remark constituted sexual innuendo and was offensive and embarrassing, but was not harassment and was not demeaning, humiliating or intended to ridicule. RD at 26-28. The respondent asserts in her exceptions that the remark was intended as a joke and not as a sexual proposition and further argues that the petitioner was motivated by the respondent's EEO complaint to document the incident. Exceptions File, Tab 5 at 163-65. We agree with the CALJ that the remark was offensive and embarrassing, particularly in view of the fact that the respondent made this remark upon meeting Rosenstein and the other employees in the White Plains Office for the first time. The fact that the respondent was joking did not it make less so. Also, the petitioner's reasons for securing a written statement from Rosenstein one year after the incident do not show that the incident did not occur or change the character of the misconduct. The specification was properly sustained. Based on the sustained specifications, charge 4 was properly sustained.

Charge 5, Abusive Conduct and Disruption of the Hearing Process

The only portion of specification 21 of charge 5 that the CALJ sustained was her remonstrating with a claimant's son in the hearing room for wearing a tank-top. The CALJ found that the respondent said to the claimant's son in the hearing room, "Excuse me, sir, you came in here with your mother ... with practically no clothes on." RD at 119. She then later said to the claimant, "So what is he doing here today besides showing me his arms?" *Id*. The CALJ found that these remarks were inappropriate and discourteous but not abusive. RD at 120.

Both the respondent and the amici, citing *In re Chocallo*, 1 M.S.P.R. 605, *aff'd*, No. 80-1053 (D.D.C. 1980), *aff'd in part, vacated in part on other grounds and case remanded, Chocallo v. Prokop*, 673 F.2d 551 (D.C. Cir. 1982) (Table), argue that such conduct should be analyzed under a higher standard appropriate for charges of misconduct based on judicial conduct. Exceptions File, Tab 5 at 173-74, Tab 6 at 8-9. In that case, the Board "affirm[ed] the rulings, findings and conclusions as set forth in the attached recommended decision" by the Board's ALJ and adopted that decision. *Chocallo*, 1 M.S.P.R. at 610. In his recommended decision, the ALJ stated that "[r]emoval proceedings based on what occurs in the hearing room should be reserved for those cases which involve serious improprieties, flagrant abuses, or repeated breaches of acceptable standards of judicial behavior." *Id*. at 632. The Board's final decision noted the ALJ's careful balancing of the need for judicial independence free from harassment, intimidation, or improper influences against judicial accountability. The Board agreed that ALJs were not immune from discipline based on misconduct in the performance of their duties, but cautioned agencies that proposed actions would be "very carefully scrutinized for adequate bases in meeting the 'good cause' standard." *Chocallo*, 1 M.S.P.R. at 611. In subsequent

cases, the Board has quoted with approval the ALJ's language, while also stating that ALJs are not insulated from discipline based on their conduct of hearings or decision writing. *See Social Security Administration v. Burris*, 39 M.S.P.R. 51, 61 (1988), *aff'd*, 878 F.2d 1445 (Fed. Cir. 1989) (Table); *Social Security Administration v. Glover*, 23 M.S.P.R. 57, 76-77 (1984).

We find that the petitioner's request for authority to remove the respondent, as supported by specification 21 based on her remarks in the hearing room in a conversation with a claimant related to a proceeding, should be given very careful scrutiny. *Chocallo*, 1 M.S.P.R. at 611. We further find that the respondent's remarks do not rise to the level of serious improprieties, flagrant abuses, or repeated breaches of acceptable standards of judicial behavior. *See Burris*, 39 M.S.P.R. at 61-62; *Glover*, 23 M.S.P.R. at 77-78. Thus, we do not sustain this specification.

The CALJ did not sustain specification 22. RD at 81-85. The petitioner did not submit exceptions or challenge these findings in any way, and we have not considered them further.

According to the portion of specification 23 of charge 5 that the CALJ sustained, the respondent barricaded the door to her office in November 1993, thereby generally disrupting the hearing process. Complaint File, Tab 1 at 8. The CALJ found that the disruption resulted from employees being unable to enter the respondent's office and thus interfered with the hearing process. RD at 79-80. In her exceptions, the respondent contends that the petitioner offered no evidence that denial of access to the respondent's office disrupted or delayed the hearing process. She points out that the CALJ noted in his recommended decision, RD at 128-29, that in 1991 she had placed a table outside her office for employees to leave cases on. Furthermore, she asserts that the petitioner did not specify which employees needed access to the respondent's office to perform their work on that occasion. Exceptions File, Tab 5 at 49-51. We agree that the evidence is lacking

that any employee was unable to perform his duties during the incident. It would not be unusual for individuals like supervisors and ALJs to request no interruptions for some period of time, so that they can work undisturbed. While the respondent's method of ensuring her privacy was unusual, and, in any event unsuccessful since employees continued to knock on her door, we can not assume that employees were prevented from performing their duties by her behavior. We do not sustain specification 23.

In specification 24, the petitioner charged that the respondent recessed a hearing to telephone Allard to complain about the conduct of a hearing monitor and that her behavior affected the performance of hearing-related work of the staff, caused lost production time because it led to placing her on administrative leave, disrupted the hearing process, and added to the back-log of cases and delay in disposing of claims. Complaint File, Tab 1 at 8. The CALJ sustained in part specification 24, based on a finding that the respondent left the hearing for a short time to make a telephone call. RD at 69-70. Attorney Walter Keenan, a claimant's representative and witness to the incident, testified without contradiction that the delay lasted only a few minutes. TR at 1015-16. In her exceptions, the respondent argues that her action was not disruptive and that the actions of others involved in the incident were disruptive. Exceptions File, Tab 5 at 146-47. We find that the petitioner did not show that the respondent's leaving the hearing room before the hearing actually began for a few minutes interfered with the conduct of hearings or delayed proceedings to the detriment of claimants and the petitioner's mission. We do not sustain specification 24.

Because none of the specifications on which charge 5 is based are sustained, we do not sustain charge 5.

Charge 6, Interference with Efficient and Effective Agency Operations

The CALJ also did not sustain specification 25 because he found that it was the subject of previous discipline, a July 19, 1993 reprimand, and eliminated it as a current charge on that basis. RD at 137, 11-13. As set forth more fully below, however, the administrative judge considered the misconduct described in specification 25, found that a portion of it was a proper basis for the prior discipline, and considered the July 19, 1993 reprimand as previous discipline in determining the appropriate penalty for the current misconduct. The petitioner did not submit exceptions or challenge these findings in any way and we do not consider specification 25 as current misconduct. However, we will consider the administrative judge's analysis of this specification further in our penalty analysis below.

The petitioner describes charge 6 as misconduct that resulted in the creation of an atmosphere of conflict, hostility, fear, and stress. Specification 26 of charge 6 described an October 29, 1993 incident in which the respondent loudly complained in an office common area about the status of her "credit hours," a time and attendance accounting method, argued with Harris-Gonzalez about it, and refused to calm down and return to her office. Complaint File, Tab 1 at 9. The respondent admitted the facts of the incident. TR at 1458. The CALJ found that her behavior contributed to the creation of an atmosphere of conflict, hostility, fear, and stress that was inconsistent with the efficient functioning of the office. RD at 72. We agree, and the respondent has offered no reason in her exceptions to disturb the CALJ's finding in this regard. Thus, we agree with his determination to sustain specification 26.

The CALJ did not sustain specification 27. RD at 35. The petitioner did not submit exceptions or challenge these findings in any way, and we have not considered them further. The CALJ failed to adjudicate specification 28. While this constitutes error, we find that such error did not prejudice the respondent's

substantive rights. *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984). Because the petitioner did not file exceptions challenging the CALJ's recommended decision, we have not considered specification 28 in determining whether the petitioner proved the charges or in determining whether good cause to remove the respondent exists. Charge 6 is sustained based on the sustained specification 26.

In summary, we accept the CALJ's determination to sustain charge 1, charge 3 (specifications 8 through 14), charge 4 (specification 16 in part, and specifications 19 and 20), and charge 6 (specification 26). We do not sustain charge 5 and its specifications, 21, 23, and 24.

Staleness of the charges

The respondent alleges that the petitioner unduly delayed, i.e., was guilty of laches, in bringing some of the charges. Some of the charges and specifications in the June 20, 1994 complaint were based on incidents which occurred beginning in 1991. Complaint File, Tab 1. The respondent argues that her ability to refute those charges and specifications was prejudiced by the delay because none of the witnesses, including the respondent, could recall in exact detail the incident in question. She further asserts that she was more prejudiced than the petitioner by the delay because the petitioner sought written statements from the participants and witnesses to the incidents closer in time to their occurrence. The respondent was unable to do likewise because she was unaware that the petitioner was investigating and documenting these incidents. Exceptions File, Tab 5 at 114-15.

The equitable defense of laches bars an action when an unreasonable delay in bringing the action has prejudiced the person against whom the action is taken. *Hoover v. Department of the Navy*, 957 F.2d 861, 863 (Fed. Cir. 1992); *Special Counsel v. Santella*, 65 M.S.P.R. 452, 465 (1994). The party asserting laches must prove both unreasonable delay and prejudice. *Hoover*, 957 F.2d at 863;

Santella, 65 M.S.P.R. at 465. In *Santella*, the Board found that a three-year delay from the time that the Special Counsel learned of the possible prohibited personnel practices and the time it initiated an action against the petitioners in that case was not unreasonable. *Santella*, 65 M.S.P.R. at 465-66. Here, the earliest misconduct on which a charge was based, specification 20, occurred in January 1991, and the removal complaint was filed in June 1994, almost 3 and one-half years later. Specifications 10, 11, 12, and 14, occurred in November 1991 and January 1992, and specification 19 occurred in November 1991.

In its post-hearing reply brief, the petitioner argued that the older incidents, when connected with more recent incidents, indicated a pattern of misconduct. Complaint File, Tab 33 at 3. We see nothing improper in the petitioner's actions here. An agency need not impose discipline for an individual act of misconduct as it occurs, but may determine that a pattern of behavior warrants discipline. *See*, *e.g.*, *Scott v. Department of Justice*, 69 M.S.P.R. 211, 229-30 (1995) (the Board sustained a charge that the appellant engaged in a pattern of behavior evidencing a lack of trustworthiness, integrity, and honesty supported by 4 specifications), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table). We find that, under the circumstances, the petitioner's delay was not unreasonable.

Nor has the respondent shown that she was prejudiced by the delay. She asserts that prejudice resulted from the fading of the memory of the participants. Exceptions File, Tab 5 at 120-21. Our review of the evidence in support of the specifications shows otherwise. The respondent admitted to using the offensive language as alleged in specifications 10, 11, and 12 of charge 3, language that is commonly considered to be vulgar. TR at 1182, 1354, 1097-98. The respondent did not testify that she had difficulty recalling any of these incidents. Specification 14 charges the respondent with using similar language, which she denied. The CALJ sustained the specification based on the testimony of Harris-Gonzalez and a January 10, 1992 memorandum prepared by Harris-Gonzalez.

The CALJ found that the respondent's denial of the misconduct was not credible. RD at 47. She testified that she "didn't use that kind of language," but she admitted to using the same vulgar and profane words on other occasions. TR at 1354. The respondent did not indicate in her testimony that she did not recall the incidents or what she said. TR at 1397-98.

Specification 19, under charge 4, demeaning comments, sexual harassment, and ridicule, the "in the biblical sense" and "You can stick it on the wall" remarks, was sustained based on the respondent admitting making the "in the biblical sense" remark. TR at 1368-70. Regarding the "stick it" remark, the respondent testified that she may have said it. TR at 1370-71. Such a response could be the result of faded memory. Nevertheless, the respondent recalled the incident. The CALJ sustained that part of the specification based on Lazar-Meyn's testimony and her January 8, 1992 written statement consistent with her testimony. RD at 37. Under the circumstances, even if the respondent did not remember the exact details of the incident, she has not shown that the delay in charging her with this misconduct prejudiced her.

Specification 20, the remark to ALJ Rosenstein, "Let's go into your office and get laid," Complaint File, Tab 1 at 4, 6, was sustained based on the respondent's testimony that she remembered making the remark, "Where do you go when you want to get laid?" TR at 1089-90. Upon consideration of the testimony, we find that the respondent did not show that she was prejudiced by the delay in bringing charges based on these incidents.

Double Punishment

The respondent argued below that none of the specifications based on incidents that occurred before the July 19, 1993 reprimand should be sustained because she had already been disciplined for those incidents by an April 22, 1992 letter of counseling or they were incorporated into the reprimand by reference to the letter of counseling. Complaint File, Tab 30 at 141-43. The CALJ found that

the letter of counseling was not discipline. RD at 11; *see, e.g., Special Counsel v. Spears*, 75 M.S.P.R. 639, 670 (1997) (oral counseling was not a disciplinary or corrective action under 5 U.S.C. § 2302(a)(2)(A)(iii) because it was not memorialized in an SF-50 or SF-52 and no record of it was placed in the employee's Official Personnel File); *Gober v. Department of the Navy*, 15 M.S.P.R. 354, 357 (1983) (prior letters of "caution and requirement" were not disciplinary actions because they imposed no discipline and stated that they were not disciplinary actions). Also, he specifically rejected the respondent's argument that the reprimand incorporated by reference the April 1992 counseling letter and thus precluded discipline for incidents occurring before that date. RD at 10-11. The reprimand contained a statement that "[t]he written material upon which this Official Reprimand is based is included in its entirety" and the list of documents included the April 22, 1992 counseling. Petitioner's Exhibit File, Tab P-30. The CALJ found, however, and we agree, that this statement does not show that the reprimand constituted discipline for the misconduct pre-dating the April 22, 1992 memorandum. Thus, the CALJ correctly considered those specifications.

Adverse Inferences

The respondent requested that the CALJ draw adverse inferences from the petitioner's failure to provide the testimony of ALJ Irwin Bernstein, Cheryl Grate, and El-Nora Carroll, agency employees who were either witnesses to or participants in some of the incidents. Complaint File, Tab 30 at 135, 158, 169-70. The CALJ found that no such inference was warranted as to Carroll. RD at 103 n.22. In her exceptions, the respondent argued that the CALJ's failure to draw adverse inferences was error. Exceptions File, Tab 5 at 171-73. We disagree. We note that the petitioner did not include any of these witnesses on its proposed witness list and thus the respondent had adequate notice that these individuals would not be called. She had the opportunity to request them as witnesses herself but chose not to do so. *See, e.g., Johnson v. Department of Justice*, 61 M.S.P.R.

110, 115-16 (1994) (the administrative judge erred by drawing an adverse inference against the agency, based on its failure to call a certain witness, where the appellant also did not call the same witness but the administrative judge did not draw an adverse inference against the appellant), *overruled on other grounds*, *Hamilton v. U.S. Postal Service*, 71 M.S.P.R. 547, 556 (1996). The respondent cites *Sagendorf-Teal v. County of Rensselaer*, 100 F.3d 270 (2d. Cir. 1996), to support her argument. In that case, the court found that the lower court did not err in giving a "missing witness" charge to the jury, allowing it to draw an adverse inference from the absence of five witnesses. *Id*. at 275-76. While that case might support a finding that an adverse inference is permissible, it does not hold that the fact-finder must draw such an inference. The CALJ was capable of evaluating all of the evidence presented and determining whether the petitioner, with or without the testimony of the three witnesses in question, met its burden of proof on the charges.

Due process

In her exceptions to the recommended decision, the respondent renews her arguments made before the CALJ that she was deprived of her due process rights to notice of the charges and a meaningful opportunity to respond to them. Specifically, she argues that the petitioner placed her on administrative leave a number of times in 1993 and 1994 and did not inform her of the basis for those actions, even though she filed grievances regarding the placement on administrative leave. The respondent also alleges that, at the same time, the petitioner was gathering written statements from agency employees regarding her conduct and that some employees were aiding others in preparing these statements. According to the respondent, the petitioner did not seek statements from employees known to be sympathetic to the respondent and was surreptitious

in the conduct of its investigation.[3] The respondent further asserts that the complaint at issue here is based on this information. Exceptions File, Tab 5 at 122-24.

When an agency subjects a nonprobationary federal employee to an appealable agency action that deprives him of his property right in his employment without prior notice and an opportunity to respond, such an action constitutes an abridgment of the employee's constitutional right to minimum due process of law. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985); *Tompkins v. Office of Personnel Management*, 72 M.S.P.R. 400, 407 (1996); *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 680-81 (1991). The statutory scheme for imposing certain discipline on ALJs, including removal, requires that notice and an opportunity to be heard before the Board be provided before the action may be taken. 5 U.S.C. § 7521. Here, the petitioner provided the respondent with notice of its intent to remove her in the complaint at issue, Complaint File, Tab 1, and the Board's procedures under 5 C.F.R. part 1201, subpart D, provided her with an opportunity to respond in regard to the charges that underlie this complaint. The respondent has not argued that the notice and the Board's procedures were lacking in due process. The Board has not found that an agency may not investigate charges without notifying the employee of the investigation. We see no infringement on the respondent's due process rights by the petitioner's conduct. *Cf., e.g., Uske v. U.S. Postal Service*, 60 M.S.P.R. 544, 550 (1994) (the thoroughness or lack of thoroughness of the agency's investigation

---

[3] The respondent argues that the petitioner violated the Privacy Act, 5 U.S.C. § 552a(e)(2), in conducting its investigation because it did not attempt to acquire the information from her. Exceptions File, Tab 5 at 118. We note that the Board does not have jurisdiction to consider claims of violations of the Privacy Act. *See Normoyle v. Department of the Air Force*, 65 M.S.P.R. 80, 83 (1994).

of an employee's alleged misconduct is not a proper basis for not sustaining the agency's charge), *aff'd*, 56 F.3d 1375 (Fed. Cir. 1995).

Affirmative defense of reprisal for whistleblowing

The respondent raised below the affirmative defense of reprisal for whistleblowing. Complaint File, Tab 4. The CALJ found that she was covered by the Whistleblower Protection Act of 1989, and that she made protected disclosures that she reasonably believed evidenced violations of law, rule, or regulation, abuse of authority, and gross mismanagement. RD at 143-67. He further found that her disclosures could have been a contributing factor in bringing the charges because Associate Commissioner Daniel Skoler, who issued the complaint, had constructive knowledge of the disclosures. He found that Allard and Pulcini, who were aware of the respondent's disclosures, had made recommendations to Skoler to take some action to ameliorate the tense atmosphere in the New Haven Hearing Office. RD at 167-78. The CALJ also found, however, that the petitioner showed by clear and convincing evidence that it would have taken the removal action in the absence of protected activity. RD at 178-84.

In determining whether an agency showed by clear and convincing evidence that it would have taken the action at issue in the absence of protected disclosures, the Board has considered the strength of the agency's evidence in support of the personnel action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved with the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Jones v. Department of the Interior*, 74 M.S.P.R. 666, 672-73 (1997). The CALJ based his finding on his balancing of the motive to retaliate on the part of Skoler and Allard and the seriousness of the charged misconduct. In doing so, he considered the weight of the evidence before Skoler and Allard, and did not consider the evidence to refute

some of the charges brought forth in this proceeding. In her exceptions, the respondent asserts that this was error. Exceptions File, Tab 5 at 144-45.

We see no error in the CALJ's consideration of the strength of the evidence that the petitioner had before it when it determined to seek authorization to remove the respondent. *See Geyer v. Department of Justice*, 70 M.S.P.R. 682, 694 (1996), *aff'd*, 116 F.3d 1497 (Fed. Cir.) (Table), *cert denied*, 118 S. Ct. 634 (1997). If an agency fails to investigate a charge sufficiently before bringing an action, such a failure might indicate an improper motive. However, if relevant facts are developed on appeal to the Board that the agency had no prior reason to know, we would not find that such facts undercut the agency's otherwise sufficiently clear and convincing evidence that, at the time of the action, its decision would have been the same in the absence of whistleblowing. Here, the CALJ found that a number of specifications and one charge were not sustained. He found that, for the most part, these specifications were not sustained because of inconsistencies between documentation and hearing testimony. There is no evidence that the petitioner's failure of proof in regard to some of the charges and specifications and its failure to provide the respondent an opportunity to answer the charges was caused by reprisal.

The record contains several documents indicating the kind of information that Skoler had before proposing the respondent's removal: A March 8, 1993 memorandum from Pulcini to Skoler regarding the respondent's behavior in general; a June 24, 1993 memorandum from the New Haven Hearing Office staff asking for immediate action to remove the respondent from the office; an October 20, 1993 memorandum from Allard to the respondent informing her that he had decided, in consultation with Skoler, to place the respondent on administration leave for the remainder of that day; and a May 26, 1994 memorandum from the attorney-advisors in the New Haven Hearing Office to Office of Hearing and Appeals Special Counsel Donald Pryzbylinski, referring to

a meeting the previous day with Skoler, describing the attorneys' interactions with the respondent from her entrance on duty in the office, and indicating that Skoler received a copy of the May 26 memorandum. Petitioner's Exhibit File, Tabs P-30, P-41, P-42. The record also contains documents complaining of or describing the respondent's behavior sent to Allard, who testified that he had the authority to recommend action to Skoler. *Id.*, Tabs P-10, P-22, P-23, P-30, P-37, P-42, P-43. The respondent submitted documents indicating that she had been in contact with Skoler over various incidents in the New Haven Hearing Office. Respondent's Exhibit File, Tab R-109. While the complaint prepared by Skoler does not cite any specific documentation as the source of the information on which the complaint is based, it is apparent from the detail in the specifications that Skoler had access to documents in this record from participants and witnesses to the incidents. The CALJ summarized the evidence before Skoler and we agree that it was sufficient to show that the misconduct charged was serious enough to warrant removal. RD at 181-85.

Also, consistent with *Scott*, 69 M.S.P.R. at 240, the CALJ weighed the seriousness of the misconduct against the motive to retaliate. He found that Skoler and Allard were not the subjects of the respondent's protected disclosures and found no evidence of a motive on their part to retaliate. RD at 179-80. He further found, however, that Pulcini had a motive to retaliate because the respondent's disclosures of alleged violations of time and attendance regulations, abuse of authority, and gross mismanagement, reflected on Pulcini's oversight of the New Haven Hearing Office. *Id*. Despite this, the CALJ found that Pulcini's influence over the decision maker, Skoler, was limited and thus found that the motive to retaliate factor under *Scott* did not weigh heavily in favor of finding reprisal. RD at 180-81.

The respondent argues in her exceptions that the CALJ erred in not considering the motives of the staff of the New Haven Hearing Office and others

to retaliate. Exceptions File, Tab 5 at 136-44. The individuals to whom the respondent refers were participants in or witnesses to the incidents on which the charges and specifications are based. It is clear from the record that the respondent was disliked by the staff and that some people wanted her removed. We acknowledge that in those circumstances their truthfulness would be in question. However, the credibility of witnesses and sufficiency of documentary evidence goes to whether the petitioner met its burden of proof on the charges and not to whether Skoler took the action in reprisal for the respondent's protected activity. The support staff had no authority to recommend a personnel action. We see no reason to disagree with the CALJ's determination that the seriousness of the respondent's misconduct outweighed the motive to retaliate.

In her exceptions, the respondent argues that the CALJ did not address the third factor in determining whether the petitioner showed by clear and convincing evidence that it would have taken the same action in the absence of the protected activity, i.e., whether the petitioner takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. Exceptions File, Tab 5 at 128-32. The respondent is correct that the CALJ did not address this factor. The respondent cites numerous examples of rudeness and use of vulgar language by the New Haven Hearing Office support staff, some of which the CALJ noted in his analysis of the charges and penalty. However, these individuals are not similarly situated to the respondent because they are not ALJs and are not supervised by the same chain of command. *See, e.g., Jones*, 74 M.S.P.R. at 681 (allegation that the agency discriminated in favor of another employee in order to retaliate against the appellant was unsubstantiated); *Caddell v. Department of Justice*, 66 M.S.P.R. 347, 351-52 (1995) (the agency reassigned three other employees who were not whistleblowers but who were otherwise similarly situated to the appellant), *aff'd*, 96 F.3d 1367 (Fed. Cir. 1996); *Rychen v. Department of the Army*, 51 M.S.P.R. 179, 183-85 (1991) (the agency

established by clear and convincing evidence that an employee who was not a whistleblower received a lesser penalty for similar misconduct than the appellant who was, because the two employees were not otherwise similarly situated).

The respondent also alleges that Pulcini was abusive toward her but was not disciplined and that another unnamed ALJ was abusive toward claimants but was not disciplined. We find that Pulcini was not similarly situated to the respondent because he did not engage in the same kind of misconduct as the respondent. While the record shows that he mistreated the respondent by screaming at her, calling her a witch and a harridan, and allowing other employees to use vulgar language, RD at 176-77, the record does not show that Pulcini similarly abused support personnel, individuals in other agency offices, and supervisory ALJs.

The respondent also contends that the CALJ erred in limiting the testimony of Bernard Shapiro, an attorney in private practice who represented claimants before the petitioner, regarding another ALJ who allegedly abused claimants but was not disciplined. When asked whether he had ever been questioned about the conduct of ALJs, Shapiro stated that he had a conversation with petitioner's attorney Sarah Humphries in which he told her that, in his opinion, another ALJ exhibited bias and sent claimants from their hearing crying and screaming. TR at 862-63. When Shapiro was asked to name the ALJ, the petitioner objected and the CALJ sustained the objection, explaining that at the prehearing conference he had informed the respondent that such evidence would only be relevant if an ALJ was alleged to have engaged in all of the misconduct that the respondent was charged with. *Id*. We see no error in the CALJ's ruling and the respondent's arguments do not show that the petitioner treated the respondent in a disparate manner. Thus, we agree with the CALJ's determination that the petitioner proved by clear and convincing evidence that it would have taken the same action against the respondent in the absence of whistleblowing and the determination that the

respondent failed to establish her affirmative defense of reprisal for whistleblowing.

Penalty

Under 5 U.S.C. § 7521(a), an agency may remove an ALJ only for "good cause," as determined by the Board. The Board has held that, while the "good cause" standard is different from the "efficiency of the service" standard applicable to decisions to take adverse actions against other federal employees, efficiency of the service cases can provide guidance in actions against ALJs. *See Social Security Administration v. Mills*, 73 M.S.P.R. 463, 468 (1996), *aff'd*, 124 F.3d 228 (Fed. Cir. 1997) (Table).

Both the respondent and the amici argue that the CALJ erred in failing to apply the "good cause" standard. Exceptions File, Tab 5 at 175-76 and Tab 6 at 4-8. We disagree. The CALJ noted in his recommended decision that "good cause" is not synonymous with "the efficiency of the service." Nevertheless, consistent with the Board's precedent, he looked to "efficiency of the service" cases for guidance. RD at 201-02. We see no error in the CALJ's analysis. The respondent argues that the special status held by ALJs precludes the Board from considering the relationship between the ALJ and his supervisor in determining the penalty and that the CALJ erred in doing so. Exceptions File, Tab 5 at 175-76. Again, we disagree. The statutory requirement of "good cause" does not insulate an ALJ from discipline for any conduct involving a relationship with a supervisor or preclude the Board from considering the effect of the misconduct on that relationship in determining whether "good cause" exists. *See*, *e.g.*, *Mills*, 73 M.S.P.R. at 468-70; *Burris*, 39 M.S.P.R. at 54-64.

In her exceptions, the respondent also asserts that the CALJ erred in failing to consider her diagnosed mental condition of dysthymia as a factor in favor of mitigation. Exceptions File, Tab 5 at 177-78. Our review of the recommended decision shows that the CALJ considered the testimony of the respondent's

psychiatrist, Dr. Viviane Lind, that she diagnosed the respondent as suffering from dysthymia, a form of depression that typically causes a person to be withdrawn and avoid conflict. TR at 922-23, 927-28. The CALJ found that the diagnosis of dysthymia did not support mitigation, because the respondent's behavior as charged was not the behavior typical of one suffering from dysthymia. RD at 185-86. Our review of Dr. Lind's testimony shows that she seemed to be unaware that the respondent exhibited behavior like that charged. Dr. Lind testified that the respondent came to see her in 1993, after an absence of some years, and that the respondent was experiencing work-related stress. However, Dr. Lind's testimony indicates that she believed that the stress was caused by physical problems, arthritis, a double mastectomy, and diabetes causing vision problems, that made commuting, working regular hours, and moving and lifting difficult. TR at 910-11, 915-17, 922, 930-32. Dr. Lind did not testify that she knew of any interpersonal conflicts that the respondent was having at work.

In her exceptions, the respondent described her emotional state at the time of the incidents as extremely volatile, and argued that Dr. Lind's testimony showed that the atmosphere in the New Haven Hearing Office exacerbated the respondent's psychiatric problems. Exceptions File, Tab 5 at 178. The respondent is correct that Dr. Lind testified that the respondent was an exceptionally truthful person, who would be quite upset by accusations of dishonesty. TR at 924. However, Dr. Lind did not testify that the respondent's reaction to such accusations would take the form of making demeaning and embarrassing comments or using vulgar and profane language. Dr. Lind testified that she had never seen the respondent being volatile. TR at 929. We agree with the CALJ that the respondent's diagnosed mental condition of dysthymia is not a mitigating factor because she did not show that it contributed to her misconduct. *See Griffin v. Department of the Army*, 66 M.S.P.R. 113, 119 (1995) (the appellant's depression was not a mitigating factor because the evidence did not

show that the appellant's medical condition caused or even contributed to the misconduct), *aff'd*, 78 F.3d 603 (Fed. Cir. 1996) (Table).

The respondent also generally argues that the atmosphere in the New Haven Hearing Office contributed to her behavior. Exceptions File, Tab 5 at 181-84. While it appears that this is so, the respondent herself played a large part in creating the atmosphere in the office. The record indicates that friction between the respondent and her co-workers began early on in her current position. Petitioner's Exhibit File, Tabs P-18, P-25, P-26. Although the Board has held that provocation and unusual job tensions may weigh in favor of mitigation, *see Garza v. Department of the Army*, 57 M.S.P.R. 214, 224, *aff'd*, 11 F.3d 1073 (Fed. Cir. 1993) (Table); *Quinata v. U.S. Postal Service*, 51 M.S.P.R. 76, 79-80 (1991), we find that the circumstances here do not weigh in favor of a lesser penalty.

The CALJ considered the seriousness of the misconduct charged in each specification. He found that the misconduct cited in charge 1, reckless disregard for physical safety, was not so serious as the petitioner and its witnesses alleged. He noted that Hearing Assistant Teresa Russo testified without contradiction that Harris-Gonzalez was laughing following the incident and that there was no serious injury. TR at 894; RD at 104. He also discounted the petitioner's claim that the employees were apprehensive about their safety that night after the incident because none of the witnesses testified to that fact. He noted that Harris-Gonzalez asserted in her written statement of the incident that the police escorted the employees from the building but another witness, Danyelle Inge, testified that the police left first. RD at 105; Petitioner's Exhibit File, Tab P-1; TR at 413. In his penalty analysis, he determined that the misconduct itself, closing the door on Harris-Gonzalez was "quite serious." He then reduced the seriousness to "moderate" because of the respondent's emotional and physical condition at the time, the fact that the precipitating incident, Inge's failure to give her a message from her doctor regarding her impending surgery, was aggravating,

and the fact that Harris-Gonzalez contributed to the incident by refusing to leave when the respondent told her to do so. RD at 186-88. We agree with the CALJ that the petitioner exaggerated the events of that day. We note that none of the witnesses explained the reason for calling the police to the scene. The respondent had left the office before the police arrived, no charges were filed, no serious injury occurred, and no property damage was reported. While we do not condone such behavior, we find that the incident was not serious, given the aggravating behavior of Harris-Gonzalez and Inge and the lack of serious injury.

Charge 3, persistent use of vulgar, profane language, was supported by 7 specifications, all of which were sustained, many based on the respondent's admitted use of such language. Specifications 10, 11, and 14 concern remarks made before the April 22, 1992 counseling, a mitigating factor. While specifications 10 and 14 were all critical of some agency employee, they were not made to that employee. The remark cited under specification 11 was not addressed to anyone in particular. Thus, these remarks would appear to reflect the respondent's habitual use of such language, rather than any intention to offend the listener. We find that this misconduct is not significant.

Specifications 12 and 13, however, describe vulgar language intended to be critical of the listeners, Boltz and Harrell. We agree with the CALJ that, even without formal prior notice, the respondent should have known that such language was inappropriate. We agree that this is serious misconduct.

Lastly, specifications 8 and 9 occurred after the respondent had been counseled to refrain from using vulgar language. As the CALJ noted, the respondent was aware that Allard, her second-level supervisor, found the word "fuck" greatly offensive. RD at 189. The CALJ also noted as a mitigating factor that the respondent was upset during that conversation with good reason. Nevertheless, he found that the misconduct was significant. RD at 188-89. Likewise, when the respondent used the words "fuck" and "shit" in a conversation

with Harris-Gonzalez about a person appearing before her in April 1994, she was specifically on notice that such language was inappropriate. We agree with the CALJ that the misconduct charged in specifications 8 and 9 was significant. RD at 191.

Charge 4, demeaning comments, sexual harassment, and ridicule, was supported by two specifications sustained entirely and another one sustained in part. On review, the respondent and amici argue that the "God will get you" remark (part of specification 16) is not significantly serious to warrant discipline. Exceptions File, Tab 5 at 180-81 and Tab 6 at 9-10. Under the circumstances, we agree. The petitioner introduced no evidence as to the context of the remark or the listener's reaction to it, and on its face, the remark is not offensive. We find that this comment is not significant misconduct.

We agree, however, that the respondent's remarks to employees El-Nora Carroll and Ann Nolan ("You are the ugliest, fattest, stupidest person I know, ... except Nan") (part of specification 16) were highly offensive. RD at 192. Likewise, asking Lazar-Meyn whether she knew Plebani "in the biblical sense," particularly in front of others and with the intention of offending Lazar-Meyn and Plebani (specification 19), was highly inappropriate. *Id*.

The remaining specification under that charge, specification 20, the respondent's remark to Rosenstein, is also highly inappropriate and shows a remarkable lack of judgment, particularly because the respondent made it upon meeting Rosenstein for the first time, after she had been an agency employee for only about 3 months. Although this incident occurred before the April 22, 1992 counseling, we find that this is not a mitigating factor because the respondent should have known that the remark, even intended as a joke, would be offensive to the ordinary listener. Consequently, we find this misconduct to be significant.

The CALJ also found that the behavior described in specification 26, under Charge 6, interference with efficient and effective agency operations, was of

moderate severity, despite the fact that the respondent issued a written apology to the staff. RD at 193. We agree. In her exceptions, the respondent offers as mitigating circumstances an allegation that there was a party going on when she engaged in the shouting and therefore no agency operations were affected. She further states that the staff's treatment of her and her emotional condition at the time are mitigating factors. Exceptions File, Tab 5 at 185-87. However, the petitioner did not state in the complaint that the respondent's action caused disruption to its operations at the specific time of the incident but that such behavior "created an atmosphere of conflict, hostility, fear, and stress," which in turn adversely affected the smooth operations of the office. Thus, the fact that the misconduct occurred during a party is not a mitigating factor. Also, the respondent's outburst was caused by her failure to earn "credit hours" for days on which she was on administrative leave, a decision not in the hands of the New Haven Hearing Office staff. Their treatment of her in other matters does not excuse her outburst.

The CALJ also determined that the prior discipline, the July 19, 1993 reprimand, did not meet the criteria for consideration as prior discipline in determining a penalty under *Bolling v. Department of the Air Force*, 9 M.S.P.R. 335, 339-40 (1981), because the respondent was not afforded an opportunity to dispute the charges before a higher level of authority than the one that imposed the discipline. He further determined that a portion of specification 25 of charge 6 was supported by a preponderance of the evidence and considered the July 19, 1993 reprimand in the penalty portion of his decision as a factor in determining whether good cause exists to remove the respondent.[4] RD at 120-37, 196-97. We see no error in the CALJ's analysis.

---

[4] The CALJ found that specification 5 of charge 2 was the subject of the reprimand because it was misconduct of the type described there and occurred

In her exceptions, the respondent asserts that the CALJ did not consider Pulcini's treatment of her during the incident described in specification 25 and a few days prior to the incident as a mitigating factor. Exceptions File, Tab 5 at 187-88. We note that the CALJ considered the stressful working conditions, including the staff's rude behavior toward her and Pulcini's treatment of her, although not specifically in the context of specification 25. RD at 193-94. We see no error in the CALJ's determination that these circumstances do not warrant imposing a penalty less than removal.

Additionally, in her exceptions, the respondent states that the CALJ did not consider her distinguished career before her service as an ALJ and asserts that she was "steadily employed for virtually all of her working life." Exceptions File, Tab 5 at 189. Her recitation of background facts enumerates a number of positions, many with relatively brief tenure, that she held in organizations of widely varying endeavors. *Id*. at 2-7. The respondent is correct that an employee's past work record is a factor to consider under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981). The CALJ noted that the respondent had a reputation for good service with the petitioner, as shown by the affidavits from attorneys appearing before the respondent. RD at 189-90, 200; Complaint File, Tab 28. However, the respondent has offered no evidence that her service in her numerous previous assignments was particularly distinguished or should warrant consideration in addition to that given by the CALJ to her service with the petitioner.

---

after the April 22, 1992 counseling. Thus, he did not consider it as a current basis for discipline. RD at 11. He also did not consider it as part of his penalty analysis because he found that the petitioner did not prove the specification by a preponderance of the evidence. RD at 55-56. Thus, specification 5 was eliminated both as a current basis for discipline and as a factor to consider in determining the penalty.

To sum up our penalty analysis, we have sustained four of the six charges and 12 of the 28 specifications. We have found that the part of specification 16 that was sustained was not significant misconduct. We have further found that charge 1 was not so serious as the petitioner alleged. Also, we have found that specifications 10, 11, and 14 were of a less serious nature because they were made before the respondent was warned about her use of offensive language and were not made to a specific individual or to the individuals involved. We also note, as did the CALJ, the mitigating factors of the respondent's physical condition which contributed to her behavior in charge 1, the rudeness of the New Haven Hearing Office staff, and Pulcini's treatment of her. We further recognize the evidence of the regard in which she was held by members of the bar practicing before her and the lack of evidence of any public notoriety to the incidents.

We also note, however, the factors weighing against a lesser penalty, i.e., her previous reprimand, her relatively brief (less than 4 years) federal tenure, her difficulty with interpersonal relationships in the office, and her lack of potential for rehabilitation.

After carefully balancing the relevant factors, we adopt the CALJ's recommendation and find that good cause exists to remove the respondent from her ALJ position.

IRA Appeals

In her petition for review of the CALJ's initial decision denying her requests for corrective action, the respondent challenges the CALJ's findings only in regard to her second IRA appeal. Exceptions File, Tab 5 at 192-96. Our review of the initial decision in her first IRA appeal, MSPB Docket No. BN-1221-94-0198-W-1, shows no reason to disturb the CALJ's explained findings. Thus, we deny her petition for review in regard to that IRA appeal.

In her second IRA appeal, MSPB Docket No. BN-1221-95-0031-W-1, the respondent identified the personnel actions allegedly taken in reprisal for protected activity as the removal proposal and her placement in a non-duty status. IRA 2, Tab 1. The CALJ addressed the respondent's allegations of whistleblowing in regard to the removal proposal as an affirmative defense in the petitioner's complaint. RD at 143-84, 215. As stated above, we agree with the CALJ's finding that the respondent did not establish her affirmative defense of whistleblower reprisal because the petitioner showed by clear and convincing evidence that it would have proposed her removal in the absence of whistleblowing. We authorize the petitioner to remove the respondent from her ALJ position in this decision. Thus, as to the removal proposal, the respondent's IRA appeal is moot. *See Occhipinti v. Department of Justice*, 61 M.S.P.R. 504, 507-08 (1994) (the appellant's subsequent removal from federal service rendered moot his IRA appeal of a claimed reorganization and reassignment because the Board could not grant him meaningful or significant relief).

Furthermore, the IRA appeal of the placement of the respondent on administrative leave is also moot for the same reason. Because we authorize the petitioner to remove the respondent from her ALJ position in this decision, ordering the petitioner to cancel her placement on administrative leave would afford her no meaningful relief. She has not alleged that she suffered monetary loss because of her placement on administrative leave. *See Occhipinti*, 61 M.S.P.R. at 508. Nor has she requested that any record of such placement should be removed from her Official Personnel File. *See Hoever v. Department of the Navy*, 70 M.S.P.R. 386, 388-89 (1996). Accordingly, we dismiss the petition for review of the respondent's second IRA appeal as moot.

ORDER

The Board authorizes the petitioner to remove the respondent from her position as an ALJ for good cause shown pursuant to 5 U.S.C. § 7521. This is the

final order of the Merit Systems Protection Board in these matters. 5 C.F.R. § 1201.113(c).

NOTICE TO THE RESPONDENT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: _____

Robert E. Taylor
Clerk of the Board

Washington, D.C.

CONCURRING OPINION OF VICE CHAIR BETH S. SLAVET

in

Social Security Administration v. Rokki Knee Carr
Docket Nos.
CB-7521-94-0033-T-1
BN-1221-94-0198-W-1
BN-1221-95-0031-W-1

For the reasons set forth below, I join the majority in authorizing the petitioner to remove the respondent from her position of administrative law judge (ALJ) for good cause shown pursuant to 5 U.S.C. § 7521. Since the respondent received an Official Reprimand on July 19, 1993 (Petitioner's Exhibit File, Tab P-30), which incorporated by reference notices referring to prior conduct, I rely only on conduct occurring after that date in reaching my decision that an action may be taken against the respondent. It is a well-established principle of civil service law that an agency may not discipline an employee twice for the same misconduct. *See Amadek v. U.S. Postal Service*, 13 M.S.P.R. 224, 226 (1982). *See also Westbrook v. Department of the Air Force*, MSPB Docket No. AT-3443-96-0819-I-1, slip op. at 9 (Dec. 8. 1997). The July 13, 1993 reprimand, which warns that any further incidents of disruptive behavior or inappropriate conduct will be addressed with more severe and formal disciplinary measures, states that it is based on enclosed written material, including a memorandum dated April 22, 1992 from the Acting Chief ALJ to the respondent. That April 22 memorandum refers to the respondent's conduct at three offices, much of which is the subject of the current sustained charges. The majority acknowledges the statement in the July 13, 1993 reprimand referring to earlier documents including the April 22, 1992 memorandum, but concludes that it does not show that the reprimand constituted discipline for the misconduct pre-dating the April 22, 1992 memorandum. The logic of that conclusion escapes me. Accordingly, I do not rely on Charge 3, Specifications 10-14 and Charge 4, Specifications 19-20.

In determining whether the petitioner may take action against the respondent, I have considered the following conduct: Charge 1 - Reckless Disregard for Physical Safety. This involves an incident where the respondent closed a door on an employee who was injured as a

result. Charge 3 - Persistent Use of Vulgar, Profane Language. In the course of an April 1994 telephone conversation, the respondent told the Regional Chief ALJ to "go fuck himself," and repeated the comment twice after being told that the language was inappropriate. Also during April 1994, the respondent directed a legal clerk to respond to a law firm's request for a continuance by saying, "You tell Richard to go fuck himself, he doesn't tell me what to do!" Charge 4 - Demeaning Comments, Sexual Harassment, and Ridicule. On November 17, 1993, the respondent told a secretary "You are the ugliest, fattest, stupidest person I know" and added, while passing another employee, "besides Nan." Charge 6 - Interference with Efficient and Effective Agency Operations. On October 23, 1993, during an office party, the respondent loudly complained about the status of her "credit hours" and refused to return to her office.

Based on the foregoing sustained charges, I agree that the preponderance of the evidence establishes good cause to discipline the respondent. The respondent's generally offensive remarks and behavior disrupted the workplace, offended co-workers, and violated generally accepted rules of conduct. *See In re Glover,* 1 M.S.P.R. 660, 663 (1980); *See generally Social Security Administration v. Davis,* 19 M.S.P.R. 279 (1984). With respect to the penalty to be imposed on an administrative law judge under 5 U.S.C. § 7521, it is the Board, rather than the agency that selects the penalty to be imposed. *See Social Security Administration v. Anyel,* 58 M.S.P.R. 261, 274, n. 23 (1993). In making the determination, the standards articulated in *Douglas v. Veterans Administration,* 5 M.S.P.R. 280 (1981) are looked to for guidance. *See Social Security Administration v. Burris,* 39 M.S.P.R. 51, 64 (1988). Having considered the nature and seriousness of the sustained charges, the respondent's history of abusive and inappropriate conduct, her four year length of service with the agency, and her lack of potential for rehabilitation, I agree with the majority that removal is warranted.

The respondent has raised the affirmative defense of reprisal for whistleblowing. The majority finds that the respondent's appeal is moot. The CALJ found that the respondent did not establish her affirmative defense of whistleblower reprisal because the petitioner showed by clear and convincing evidence that it would have proposed her removal in the absence of whistle-

blowing.[1] Since the petitioner is challenging this finding, there is no basis for finding that the respondent's appeal of that determination is moot and I see no basis for disturbing the CALJs findings. The majority also dismisses the petition for review of the respondent's second IRA appeal concerning the placement of the respondent on administrative leave as moot. The CALJ determined that the respondent failed to show that her protected disclosures were a contributing factor in the petitioner's decision to place her on administrative leave and that the petitioner proved by clear and convincing evidence that it would have placed her in a non-duty status in the absence of her protected disclosures. I see no reason to disturb the CALJs initial decision denying the respondent's request for corrective action in her second IRA appeal.

For the foregoing reasons, I concur in the result reached by the majority.

APR 24 1998

Date

Beth S. Slavet, Vice Chair

[1] With respect to the petitioner's argument concerning alleged disparate treatment, the majority agrees with the CALJ's limiting the testimony of Bernard Shapiro regarding another ALJ who allegedly abused claimants but was not disciplined. The majority finds that such evidence would only be relevant if an ALJ was alleged to have engaged in all of the misconduct that the respondent was charged with. Although I agree with the limitation of the testimony, I find no support for the majority's overreaching statement. In order to prove disparate treatment, a respondent must show that a similarly situated employee received a different penalty. *See Social Security Administration v. Mills*, 73 M.S.P.R. 463, 472-3 (1996*), citing Parker v. Department of the Navy*, 50 M.S.P.R. 343, 350 (1991*)* (The "charges and the circumstances surrounding the charged behavior must be substantially similar.")